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The Impact of Incorporation—Double Jeopardy and the States: Benton v. Maryland

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THE IMPACT OF INCORPORATION— DOUBLE JEOPARDY AND THE STATES:

BENTON v. MARYLAND[1]

The degree to which specific provisions of the Bill of Rights will protect criminal defendants in state prosecutions has long been an area of controversy. During the first half of the twentieth century the Court's position was that the Fourteenth Amendment Due Process Clause[2] functioned as a natural-law formula, invalidating state action, without regard to the specific language of the first ten amendments, only when such action, on the facts of a particular case, was "shocking to a universal sense of justice" or resulted in "a denial of fundamental fairness".[3] In 1961, with *Mapp v. Ohio*,[4] the Court began a departure from this doctrine, viewing the Fourteenth Amendment as a reference to the Bill of Rights, absorbing certain amendment guarantees to make federal standards of protection applicable against state violation.[5] The instant case provides yet another forum for these competing positions within the framework of the Fifth Amendment Double Jeopardy Clause.[6]

Petitioner, John Dalmer Benton, was tried in a Maryland state court on charges of burglary and larceny. Though acquitted of larceny, he was convicted of burglary and sentenced to ten years in prison. Subsequent to filing notice of appeal, and prior to a hearing, the Maryland Court of Appeals decided *Schowgurow v. Maryland*,[7] invalidating a section of that state's constitution requiring grand and petit jurors to affirm a belief in God. Thereafter, Benton's case was remanded to the trial court to determine whether he wished to take advantage of the relief afforded under the *Schowgurow* decision. Benton exercised his option to have the original indictment declared invalid, and he was again charged with both larceny and burglary. He objected to the larceny count on the basis that retrial for that offense would violate constitutional prohibitions against double jeopardy. The lower

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[1] 395 U.S. 784 (1969).

[2] U.S. CONST. amend. XIV, § 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

[3] Courts have used varying terminology. *See* Duncan v. Louisiana, 391 U.S. 145 (1968); Betts v. Brady, 316 U.S. 455 (1942); Palko v. Connecticut, 302 U.S. 319 (1937).

[4] 367 U.S. 643 (1961).

[5] 395 U.S. at 808 (Harlan, J., dissenting).

[6] U.S. CONST. amend. V: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

[7] 240 Md. 121, 213 A.2d 475 (1965).

court denied petitioner's motion to set aside this count. Benton was then tried and convicted of both offenses and given concurrent sentences—fifteen years for burglary and five years for larceny.

On appeal to the Maryland Court of Special Appeals, the trial court conviction was affirmed. After the Court of Special Appeals denied review, certiorari was granted by the United States Supreme Court. Justice Marshall, in a six-two opinion, held that as the Double Jeopardy provision of the Fifth Amendment was applicable to the states, Maryland's action of conditioning petitioner's appeal on a surrender of his former acquittal for a different offense was invalid. Prior to a decision on the merits, however, the Court was faced with the contention that the existence of concurrent sentences constituted a jurisdictional bar to federal review.

It is clear that where a defendant is convicted of two criminal offenses, an allegation that constitutional rights were violated as to each is sufficient to constitute a case or controversy, and thus avoid the Article III[8] jurisdictional bar in federal actions. As stated in *Muskrat v. United States*,[9] a case or controversy includes "the claims of litigants . . . for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."[10] In this context it is the mere fact of conviction which supplies jurisdiction—the sentence or time in custody is irrelevant.[11]

Where the sentences imposed are to run *consecutively*, and the defendant raises constitutional objections to *either* conviction, it is likewise evident that jurisdiction exists.[12] The rationale for granting a present right to review where the conviction appealed precedes the other is that, although reversal will not result in release from confinement, the effect of denying an immediate appeal would be that the former conviction could not be challenged until after it was served.[13] Thus, in retrospect, a case or controversy does

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[8] U.S. CONST. art. III, § 2:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . —to Controversies to which the United States shall be a Party; —to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

[9] 219 U.S. 346 (1911).

[10] *Id.* at 357.

[11] It is evident that the mere release of a prisoner does not automatically terminate consideration of his case. The Court has adjudicated the merits of criminal cases in which the sentence has been fully served or where the probationary period in which a suspended sentence can be reimposed has lapsed. *See* Sibron v. New York, 392 U.S. 40 (1968); Ginsberg v. New York, 390 U.S. 629 (1968); Pollard v. United States, 352 U.S. 354 (1957); United States v. Morgan, 346 U.S. 502 (1954); Fiswick v. United States, 329 U.S. 211 (1946).

[12] *See* Peyton v. Rowe, 391 U.S. 54 (1968); Walker v. Wainwright, 390 U.S. 335 (1968).

[13] *See* Walker v. Wainwright, 390 U.S. 335, 336 (1968).

exist. Where the conviction appealed carries a sentence which is to be served *subsequent* to an unattacked conviction and sentence, the rationale is similar.[14] Were adjudication on the merits to delay, perhaps for decades, the defendant could very well be substantially prejudiced; evidence would become "cold", witnesses may become unobtainable, and in any event, the defendant would still be in custody during the time of appeal.[15] Thus postponement of an adjudication on the merits, even where the defendant attacks a sentence he has not yet begun to serve, "lessens the probability that the final disposition of the case will do substantial justice."[16]

However, where *concurrent* sentences are given, and petitioner appeals but one,[17] courts have maintained inconsistent positions.[18] When the lengthier sentence was challenged, the rationale of the consecutive sentence cases was applied, as the length of the defendant's future imprisonment was at stake.[19] Upon an attack of the lesser sentence, however, courts have relied without discussion upon precedent stemming from *Claassen v. United States*,[20] which approved English decisions that "if there is any one count

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It is clear that federal collateral attack may not be utilized. 28 U.S.C. § 2254 (1964) provides in part:

> An application for a writ of habeas corpus in behalf of a person *in custody* pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State . . . . (emphasis added.)

In Carafas v. La Vallee, 391 U.S. 234 (1968) the Court ruled that if a habeas corpus petition was filed while the defendant was in custody, it would still fulfill the requirements of this statute even though he were released from custody when the petition was ultimately heard. But, in Eldridge v. Peyton, 295 F. Supp. 621 (W.D. Pa. 1968), the court held that when a habeas corpus petition was filed *after the defendant had been released from custody*, the federal courts under this statute lacked jurisdiction.

28 U.S.C. § 2255 (1964) is also in point, stating, "A prisoner *in custody* . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." (emphasis added.)

14 Peyton v. Rowe, 391 U.S. 54 (1968).

15 This list is not meant as exhaustive of all possible consequences. The author recognizes that other problems, such as lost records, could develop to impede the opportunity of a fair trial upon delayed review. Further, not only the petitioner, but the state as well could be prejudiced. If evidence becomes "cold" the state may not have the means to reprosecute.

16 Peyton v. Rowe, 391 U.S. 54, 62 (1968).

17 The problem arises not only in the case of multiple convictions, but also where a sentence rests upon multiple counts. If any one of the counts is valid, it is considered sufficient in itself to sustain the sentence, and thereby precludes challenging the validity of the other counts. Claassen v. United States, 142 U.S. 140 (1891).

18 395 U.S. 784, 789 (1969) *citing* Barenblatt v. United States, 360 U.S. 109, 115 (1959); and Roviaro v. United States, 353 U.S. 53, 59 n.6 (1957) as examples.

19 Where the concurrent prison terms are fifteen years and five years, a denial of petitioner's challenge to the five year count leaves the longer sentence in effect. Thus, a challenge of the five year count, even if successful, would not result in reducing the period of petitioner's detention.

20 142 U.S. 140 (1891).

to support the verdict, it shall stand good, not withstanding all the rest are bad."[21]

Analogies to this doctrine have been invoked in American law as a jurisdictional bar to a consideration of convictions carrying concurrent sentences. The rationale is that one valid conviction and sentence precludes the necessity (or value) in challenging the other, as the defendant, in any event, would still remain incarcerated under the longer sentence. The question before the Court in *Benton*, prior to an adjudication on the merits, was whether this concurrent sentence doctrine precluded the existence of a live case or controversy suitable for resolution.

Acknowledging that this area of law was in a state of flux, and that the concurrent sentence doctrine had been haphazardly applied, the Court held that "there [was] no jurisdictional bar to consideration of challenges to multiple convictions, even though concurrent sentences were imposed,"[22] as the existence of a valid concurrent sentence itself did not "remove the elements necessary to create a justiciable case or controversy."[23] In reaching this decision the Court relied heavily upon *Sibron v. New York*.[24]

Sibron involved a challenge to a state court conviction heard by the Supreme Court after petitioner had completed his sentence. The state alleged that because defendant was no longer in custody, the case had become moot, and thus the Court lacked Article III jurisdiction. In denying this contention, the Court held that "a criminal case is moot only if . . . there is *no* possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction."[25] (emphasis added.)

This was not a novel statement; it had been alluded to in prior decisions.[26] The significance lies, however, in the cases that were quoted with approval, which denied mootness where the adverse consequences were at best remote. In *Ginsberg v. New York*,[27] the unlikely possibility that a Commissioner might use his discretionary power to prevent the petitioner from operating a luncheonette, because of a previous obscenity conviction, was sufficient to provide jurisdiction. In *Fiswick v. United States*[28] the same result obtained where an alien was subject to possible deportation for having committed a crime involving "moral turpitude", despite the fact that his crime was never

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21 *Id.* at 146.

22 395 U.S. 784, 791 (1969).

23 *Id.* at 790.

24 392 U.S. 40 (1968).

25 *Id.* at 57.

26 *See* Pollard v. United States, 352 U.S. 354 (1957) (possibility of consequences collateral to the sentence justifies considering the merits of the case); United States v. Morgan, 346 U.S. 502 (1954) (convict possibly subject to higher sentence as a recidivist in state court due to prior federal conviction).

27 390 U.S. 629 (1968).

28 329 U.S. 211 (1946).

held or suggested to fall within that category. Thus as Sibron's conviction could be used to impeach his testimony in future judicial proceedings, or place him under the sanction of a recidivist statute, *these and other possible adverse consequences stemming from a conviction* established a case or controversy.

The rationale of *Sibron* compelled the decision that the concurrent sentence doctrine could not function as a jurisdictional bar. The collateral effects in *Benton* consisted not of imprisonment, but of the non-custodial consequences of conviction. Recognizing the vital importance of keeping open avenues of judicial review of deprivation of constitutional rights, the Court, by upholding jurisdiction, thus maintained its policy emanating from *Fay v. Noia*,[29] that "finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[30]

While the Court negated the existence of the concurrent sentence doctrine as a jurisdictional bar, it did not decide whether that doctrine had continuing validity as a rule of judicial convenience. The Court determined that even were it retained as a discretionary rule, sufficient factors existed in the instant case as not to warrant an application of discretion. In the opinion the Court enunciated no express rule for determining whether to apply discretion. The outlines of such a rule, however, may be ascertained by an examination of the various factors considered by the Court.

In addition to the recidivism and impeachment aspects, the majority relied on the fact that the Maryland court had not applied the concurrent sentence doctrine and had reached the double jeopardy question. This may have indicated a *state* interest in the larceny conviction, and as the importance of a conviction would rest upon *Maryland* law, the Court gave weight to the judgment of the Court of Special Appeals. The Court further noted that were the burglary conviction successfully appealed, or the sentence reduced, Benton would have a *right* to review.[31] The Court also reiterated the *Sibron* statement concerning the preferability of determining possible constitutional violations on direct review.

This textual discussion is analogous to that provided in *Sibron* and the decision appears to adopt that rationale as the test for determining the use of discretion. Yet it is then questionable that the Court would fail to decide that the concurrent sentence doctrine on direct review did not even retain validity as a rule of judicial discretion. The impact of *Sibron* is that unless *no* collateral harm can be foreseen (in theory or in fact), jurisdiction exists. The analogy here would be that unless no collateral harm can be foreseen,

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[29] 372 U.S. 391 (1963).

[30] *Id.* at 424.

[31] 395 U.S. 784, 793 (1969). *See* Fay v. Noia, 372 U.S. 391 (1963).

discretion will not be exercised. The effect, sub silentio, should be therefore, that where the Court has jurisdiction on direct appeal, as any conviction may adversely affect the defendant, discretion may not be expressed.

Justice White, who concurred, and Justices Harlan and Stewart, who dissented, believed that the concurrent sentence doctrine had continuing validity as a rule of judicial convenience. It was unimportant that Maryland had reached the double jeopardy issue, in that, "this Court has never regarded itself as bound to reach the constitutional issue merely because the court below did so, and has often declined to pass upon constitutional questions even though fully canvassed by the lower court."[32] Justice Harlan further argued for strict adherence to the Court's practice of refraining from passing on constitutional questions in advance of necessity. The justification for applying the doctrine was that the unreviewed count results in no *immediate* harm to the petitioner. Regardless of the decision, Benton would still be incarcerated on the valid count. Viewing the probability of reduction of the burglary sentence as "manifestly negligible",[33] other possible adverse collateral effects were considered as equally remote.[34] The dissent argued that only a few states would use the larceny conviction against Benton for purposes of sentencing him as a habitual offender, especially where he already had a record of three felony convictions.[35]

[32] 395 U.S. 784, 806-07 (1969).

[33] *Id.* at 804 n.6.

[34] As further support, Justice Harlan rejected petitioner's contention that the burglary conviction was tainted by the introduction of evidence admissible *solely* to prove the larceny charge. The majority did not consider the taint question in the context of discretion under the concurrent sentence doctrine. Rather, it viewed the determination of the issue as requiring a remand to the state court. Not sufficiently familiar with Maryland substantive and evidentiary law, the Court was unable to determine if the jury had been prejudiced by evidence introduced in the joint trial of larceny and burglary which would have been inadmissible under state law in a trial for burglary alone.

Justice Harlan's review of the Maryland criminal procedure lead him to conclude that

> petitioner's acquittal of larceny at his first trial may have rested solely upon that jury's unique view of the *law* concerning that offense, and cannot be taken as having necessarily "determined" any particular question of fact. 395 U.S. at 804.

Under the Maryland constitution the jury is judge of both law and fact. (MD. CONST. art. XV, § 5.) Therefore it is necessary to examine the trial record as well as Maryland procedure to determine upon which basis the conviction was held not to be tainted by evidence introduced on the larceny count. The converse of Justice Harlan's reasoning is just as plausible—the acquittal may have rested on facts actually litigated and determined. Further, the fact that the Maryland Court of Special Appeals found it necessary to consider the double jeopardy question indicated that a larceny conviction itself may carry collateral consequences of importance to a petitioner in Maryland. Thus it cannot be conclusively decided, without further inquiry into the record of the lower court, that there are no appreciable collateral effects adverse to Benton as a result of the larceny count.

[35] 395 U.S. at 805.

Further, the identical origin of these two convictions would, in all likelihood, reduce the impact of the larceny conviction to negligible proportions.

This argument, however, fails to adequately conform with the rationale of *Sibron*. While *Sibron* ostensibly focused on the observable adverse collateral legal effects upon the specific individual defendant, that portion can be read as superfluous. The Court there clearly reiterated its stance in *Pollard v. United States*.[36] *Pollard* did not detail the adverse effects upon the defendant and yet stated that "[t]he possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits."[37] The inference, which the *Sibron* court cited with approval, was that "the obvious fact of life [is] that most criminal convictions do in fact entail adverse collateral legal consequences. The mere 'possibility' that this will be the case is enough to preserve a criminal case . . . ."[38]

Further, when considering the specific consequences for the specific individual, *Sibron* itself discussed the effect of numerous previous convictions. The Court stated:

> It is impossible for this Court to say at what point the number of convictions on a man's record renders his reputation irredeemable. And even if we believed that an individual had reached that point, it would be impossible for us to say that he had no interest in beginning the process of redemption with the particular case sought to be adjudicated. We cannot foretell what opportunities might present themselves in the future for the removal of other convictions from an individual's record.[39]

Justice White, in a different context, approved retaining the concurrent sentence doctrine as a valuable discretionary tool, balancing the interest of the Court in avoiding an overcrowded docket against petitioner's interest in obtaining an immediate appeal. He found merit in seeking to avoid delays, in other cases, caused by the need for added time for review of concurrent counts. "This is not a rule of convenience to the judge, but rather of fairness to other litigants"[40] as more pressing claims may then be heard. The premise is that the unreviewed count has no immediate importance. This does not exclude the possibility that the situation may change at some future time. As Justice White suggested, if adverse collateral effects do become a reality, "the lack of earlier review can be cured by then supplying the convict the review to which he would earlier have been entitled but for his concurrent sentence on another count."[41]

It is questionable, however, whether this is an adequate rationale upon which to base a discretionary rule. Problems are discernable if a later review is utilized in an effect to "cure" the harm of an allegedly invalid con-

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[36] 352 U.S. 354 (1957).
[37] *Id.* at 358.
[38] 392 U.S. at 55.
[39] *Id.* at 56 (footnote omitted).
[40] 395 U.S. at 799.
[41] *Id.* at 800.

viction. The reality of collateral effects would, in most cases, occur after the permitted time for appeal. And if petitioner had been released, he would then also lose the ability to bring a federal habeas corpus action.[42] Thus the only relief open would be in the judicial proceeding which was the cause of the reality of the harm. Were this in another state, the difficulties in litigating an evidentiary problem, perhaps with competent witnesses thousands of miles distant, are both apparent and undesirable. The Court in *Sibron*, was also faced with the contention that litigation should await the time when possible collateral effects ripen into actuality. The rejoinder of that Court was that:

> It is always preferable to litigate a matter when it is directly and principally in dispute, rather than in a proceeding where it is collateral to the central controversy. . . . And it is far better to eliminate the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action.[43]

The possible adverse effects of a postponed review presented Justice White with no irreconcilable difficulties. He noted that as a cold and stale record is inherent in appellate review, defendants would not be prejudiced by allowing the record to become "colder". Should such prejudice result, however, he characterized it merely as an "unfortunate byproduct of an initially crowded docket."[44]

This too appears unacceptable. In addition to the reasons stated in *Sibron*, the same rationale utilized in denying the existence of the concurrent sentence doctrine as a jurisdictional bar is applicable. Witnesses may die or forget facts, records may be lost—a host of adverse effects loom across the horizon. Governmental interests in the protection of society could also suffer. The case may be subsequently reversed, and necessary witnesses may not then be present or able to testify in convicting the guilty.

In light of the above considerations, the essence of the majority opinion is that a defendant who alleges that the state, in obtaining a conviction, acted in such a manner as to violate certain constitutionally mandated safeguards, has a right to confront the state with that violation and demand redress. To hold otherwise would be contrary to any notion of constitutional justice. The press of judicial business, the relative density of cases on the docket, the efficacious employment of judicial resources—each rationale is deemed unworthy to prevent adjudication of constitutional guarantees. The effect is to preclude from the state, an opportunity, within the technicalities of sentencing procedures, to violate fundamental rights with impunity. By rejecting the concurrent sentence doctrine, the Court was able to reach a decision on the merits.

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[42] *See* discussion concerning habeas corpus *supra*, n.13.

[43] 392 U.S. at 56-57.

[44] 395 U.S. at 800.

The Fifth Amendment requires that no person be twice put in jeopardy for the same offense. The purpose of this Fifth Amendment provision has been seen, by the Supreme Court, as a protection from:

> [R]epeated attempts [by the state with all its resources] to convict an individual for an alleged offense, [resulting in] embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[45]

Once the individual has been acquitted, he cannot be prosecuted again for the same charge, unless such acquittal has been set aside on appeal. However, it is generally conceded that an individual may be tried again for the same offense where a verdict against him is set aside on his motion and a new trial is granted. The underlying rationale, as stated in *Green v. United States*,[46] is that by his voluntary consent the appellant has foregone his plea of former jeopardy by asking that the conviction be set aside.

Green, however, was a federal case, in which the defendant, although indicted and tried for first degree murder, was convicted instead of second degree murder. He appealed and the conviction was reversed. On remand, Green was again tried for first degree murder. The Supreme Court held that an appeal of one offense cannot be conditioned on a coerced surrender of a valid plea of former jeopardy on another offense.[47] Such procedure was declared to be "a forfeiture in plain conflict with the constitutional bar against double jeopardy."[48] Thus, the appeal of his erroneous conviction did not constitute a valid waiver as it rested upon surrender of a plea of former jeopardy on a different offense for which he was acquitted and which was not related to his appeal.

Upon this rationale, were *Benton* a federal case, it is clear that the defendant could not be subject to retrial for larceny. While it is evident that rights may be waived, "waiver" necessarily recognizes the element of free choice.[49] Such is non-existent here, for the petitioner must either forfeit his protection against double jeopardy or lose his opportunity to appeal. This situation is analogous to that of *United States v. Tateo*[50] which suggested that under a conditioned appeal, "waiver" becomes merely a "conceptual abstraction".[51] As the former indictment could only be set aside by accepting the option of a new trial, it seems "only voidable . . . *not absolutely void.*"[52] (emphasis added.) The fact that the original indictment

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[45] Green v. United States, 355 U.S. 184, 187-88 (1957).

[46] *Id.* at 189.

[47] *Id.* at 193-94.

[48] *Id.* at 194.

[49] "Waiver" is the "intentional or voluntary relinquishment of a known right; . . . or when one dispenses with the performance of something he is entitled to exact." BLACK'S LAW DICTIONARY 1751 (4th ed. rev. 1968).

[50] 377 U.S. 463 (1964).

[51] *Id.* at 466.

[52] 395 U.S. at 797. Maryland contended that as the original indictment was in-

was itself invalid does not mean that petitioner was never placed in jeopardy. The defendant had a valid double jeopardy plea which, according to *Green,* "he cannot be forced to waive."[53] A contrary result would give the privilege efficacy in theory only. This in essence was the decision of the majority in *Benton*—federal standards applied and under the rationale of *Green,* upon retrial, petitioner suffered a breach of his Fifth Amendment Double Jeopardy privilege.

Benton, however, was a state court decision. This is a factor of significance in the historical development of American constitutional law. Previously the Court had declared that the Fifth Amendment Double Jeopardy Clause, as part of the Bill of Rights, was originally drafted for protection solely against federal encroachment, and was not intended as a restriction on state action.[54] In this vacuum different standards emerged. Questions which would have been determined under the Double Jeopardy Clause in federal courts, were instead to be controlled in state courts under the Due Process Clause of the Fourteenth Amendment. *Palko v. Connecticut*[55] well illustrates this previous approach.

Palko, on facts similar to *Green,* although indicted for first degree murder, was convicted instead of murder in the second degree. After a successful appeal by the state, Palko objected that the new trial for first degree murder placed him twice in jeopardy.[56] The Supreme Court, in reviewing this contention, held that the Double Jeopardy protection against federal prosecutions was not made applicable to the states by the Fourteenth Amendment. Petitioner's only relief therefore was under the Due Process Clause, which required that he not be subject to "a hardship so acute and shocking that our polity will not endure it."[57] Under this clause, the question became whether state action violated "fundamental principles of liberty and

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valid, the petitioner had never been in "former jeopardy" and thus could not avail himself of the Fifth Amendment Double Jeopardy provision. Characterizing the indictment as voidable rather than void, as his sentence would have been served had he not appealed, the Court cited to United States v. Ball, 163 U.S. 662 (1896), for its holding that a technically invalid indictment is sufficient to constitute jeopardy. An opposite result would "allow the Government to allege its own error to deprive the defendant of the benefit of an acquittal by a jury." *Id.* at 797.

[53] 395 U.S. at 797.

[54] Warren, *The New "Liberty" Under The Fourteenth Amendment,* 39 HARV. L. REV. 431, 440 (1925).

[55] 302 U.S. 319 (1937).

[56] It is the general rule that "jeopardy" does not attach until a jury has been empaneled. As noted in Hunter v. Wade, 169 F.2d 973, 975 (10th Cir. 1948):

> [A]n accused is in jeopardy within the meaning of the guaranty against double jeopardy contained in the Fifth Amendment to the Constitution of the United States when he is put on trial in a court of competent jurisdiction . . . and a jury has been empaneled and sworn; and where the case is tried to the court without the intervention of a jury, jeopardy attaches when the court begins the hearing of evidence.

[57] 302 U.S. at 328.

justice which lie at the base of all our civil and political institutions."[58] *Palko* then attempted to define the test as "the very essence of a scheme of ordered liberty."[59]

In *Palko* the contention was that the *state* was prejudiced by trial court errors. Retrial of Palko thus was not a denial of fundamental fairness as the state had a legitimate interest in prosecuting the appeal. Where there is error of law to the prejudice of the state, societal interests in convicting the guilty are deemed sufficient to justify such an appeal.[60] In *Palko* the state asked merely for a trial free from error—the reciprocal privilege of the accused's right to review. The Court in *Palko* concluded: "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [the right to indictment and jury trial being afforded petitioner on the facts of that case]."[61] The dissent in *Benton* declined to part from the *Palko* rationale, characterizing it as one of the Court's truly great decisions. The question thus concerned the possible state interests to be served in conditioning Benton's burglary appeal upon waiver of a valid acquittal on the previous larceny charge.

The defect in Benton's first trial was not a substantive legal error, but was rather a procedural one. Justice Harlan noted that not only did the state not appeal, in contrast to *Palko*, but that the trial itself was free from any *prejudicial* error. The unconstitutional selection of the grand jury did not affect Benton's subsequent acquittal. He acknowledged the fact that when a fair trial results in an acquittal, the defendant's interest in repose must have priority as a "principal of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[62] Therefore, the dissent emphasized, the state's interest in forcing a second trial on the acquitted larceny count was no greater than in the obviously impermissible "retrying [of] any other person declared innocent after an *error-free* trial."[63] (emphasis added.) Retrying the petitioner merely on the burglary count, the crime of which he had been previously convicted, would have been sufficient to serve society's interests. Thus, while *Benton* and *Palko* were factually distinguishable, it should be noted that the majority *result* in *Benton* was also reached by the dissent under the *Palko* "shock-the-conscience" or "fundamental fairness" test.

Benton's retrial on the larceny count *did* effect a denial of due process, under either the state or federal standards. The question thus arises as to why the split on the Court then occurred. Insofar as the same result was reached under *Palko*, what was the significance of the Court's action in

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[58] *Id. quoting* Herbert v. Louisiana, 272 U.S. 312 (1926).
[59] *Id.* at 325.
[60] 395 U.S. at 812.
[61] 302 U.S. at 325.
[62] 395 U.S. at 810, *quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937).
[63] 395 U.S. at 813.

choosing to overrule it?

The split results from differing interpretations, both literal and philosophical, of the function of the Fourteenth Amendment Due Process Clause. The dissent followed the "shock-the-conscience" or "fundamental fairness" test through which the Fourteenth Amendment functions as a natural-law formula, restricting state violations of fundamental propriety under the concept of due process. In contrast, the majority utilized what has come to be known as the "theory of incorporation"[64] in which the Fourteenth Amendment Due Process Clause is construed to encompass specific Bill of Rights guarantees and uphold their integrity against state violation. Rather than argue, as would the dissent, that a state law restricting expression violates fundamental fairness and inherent justice, in short, a vital liberty protected by the Due Process Clause, the majority might state that this very same clause "incorporates" the specific First Amendment rights of free speech and assembly, and makes its provisions applicable to the states.[65]

It may be, as in the instant case, that either use of the Due Process Clause will provide the same result. Yet, since *Mapp v. Ohio* in 1961, the Supreme Court has rejected the fundamental fairness test in favor of incorporation.[66] Thus the theory underlying *Palko* had been tacitly rejected prior to *Benton.* The dispute, however, still exists, occasioned by the differences, both practical and theoretical, that each may portend for the American system.

Under the *Palko* rationale, state sovereignty and the inherent police power of a state was strongly recognized. Under the then prevalent concept of federalism, the state had primary responsibility for defining and prosecuting crimes.[67] As the federal system was somewhat remote from particular state problems, it was evident that necessary procedural differences did and should exist between state and federal law. The state could thus structure its systems for dealing with local problems free of all federal constitutional restrictions, save those specifically directed against state action. Primary among these was "pure" due process which the Fourteenth Amendment, without more, imposed.

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[64] While this language is common usage the majority has never used the specific term "incorporate".

[65] *E.g.* Edwards v. California, 314 U.S. 160 (1941).

[66] *See* Duncan v. Louisiana, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial in criminal cases); Klopfer v. North Carolina, 386 U.S. 213 (1967) (Sixth Amendment right to a speedy trial); Pointer v. Texas, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); Ker v. California, 374 U.S. 23 (1963) (Fourth Amendment privilege against unreasonable searches and seizures); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel in criminal cases).

[67] Abbate v. United States, 359 U.S. 189, 195 (1959).

This requirement could be and was met in part, by utilizing different procedures than those inherent in the Bill of Rights as restrictions on the federal government. State law, aside from the influence of common development, could thus, within the confines of due process, radically alter, or even fail to provide for, a counterpart to specific amendment mandates. As the state was left free to experiment within this immediate area of, for example, criminal procedure, the ultimate effect was a grant to each state, except where such action violated the fundamental fairness of due process, to provide for its own separate and distinct Bill of Rights.

It is this concept of federalism which Justice Harlan, as spokesman for the fundamental fairness doctrine, wishes to retain. He views the incorporation theory as culminating in an erosion of federalism, in that it effectively denies any role for state governments by making federal constitutional and case law preeminent in the field.[68] This assumes, however, that all specific Bill of Rights guarantees are incorporated, and that the full panoply of federal standards emanating from each amendment is applied. It can be seen however, that this is not the case.

It is significant to note the degree to which the Court has employed the incorporation doctrine. A theory of total incorporation of all the Bill of Rights, though often argued, has never generated great support among members of the Court.[69] Rather, the Court has chosen to judge each amendment as it comes into issue. This theory of "selective" or "partial" incorporation does not therefore bind the Court to apply each amendment restriction in advance of necessity or in absence of proper consideration. Thus where a specific amendment guarantee, supported by case or controversy jurisdiction, is brought into question, the Court examines whether that *specific right* alone is "fundamental". If so, incorporation follows, and that right is applicable per se to the states without regard to whether the specific facts of that case "shock the conscience".[70]

[68] Justice Harlan has consistently remained opposed to incorporation of the amendments. *See* his opinions in the following cases: Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (dissenting); Klopfer v. North Carolina, 386 U.S. 213, 226 (1967) (concurring); Pointer v. Texas, 380 U.S. 400, 408 (1965) (concurring); Malloy v. Hogan, 378 U.S. 1, 14 (1964) (dissenting); Ker v. California, 374 U.S. 23, 44 (1963) (concurring); Mapp v. Ohio, 367 U.S. 643, 672 (1961) (dissenting).

[69] *See* Justice Black's dissenting opinion in Adamson v. California, 332 U.S. 46, 68 (1947). As the foremost advocate of total incorporation, Justice Black proposes that the Fourteenth Amendment makes the entire Bill of Rights provisions directly applicable to the states. This theory is diametrically opposed to Justice Harlan's position that the states may provide a fair trial under the due process clause of the Fourteenth Amendment by methods other than those enumerated in the Bill of Rights. The Court, as evidenced in Duncan v. Louisiana, 391 U.S. 145 (1968), and again in *Benton*, has chosen a middle road between Justices Harlan and Black by incorporating those amendments "fundamental to the American scheme of justice." *Id.* at 149.

[70] The Palko rationale, on the other hand, looks to the *specific facts* of the case without regard to the right involved. Thus, it would be possible to hold that on the

Dissenting in *Duncan v. Louisiana*,[71] where the defendant was denied a jury trial, Justice Harlan rejected "selective" as well as total incorporation.[72] He feared that either theory will eventually result in "incorporating" the Bill of Rights into the Due Process Clause.[73] This had not yet occurred, although a significant number of the amendments have been applied against the states.[74] In all probability, the end result will *not* be the same if the amendments are absorbed on a piece-meal basis through selective incorporation rather than under total incorporation.

The Court is not unmindful of the fact that it cannot restrict state power to deal with local crime without a close examination of the individual state's problems and experience. Illustrative of this is the fact that the states have not been required to follow federal standards with regard to the Fifth Amendment provision for Grand Jury Indictment.[75] This provision had been litigated and remains unincorporated;[76] a majority of states now provide that criminal proceedings may be commenced by the filing of an "information".[77]

Other provisions when litigated may similarly remain outside the scope of incorporation. There is nothing in *Benton* itself that indicates the Court's view on this mater has shifted. As that Court stated:

> Once it is decided that a *particular* Bill of Rights guarantee is 'fundamental to the American scheme of justice,' . . . the same constitutional standards [that is, in the sense of the privilege itself rather than the *method of enforcement*] apply against both the State and Federal Governments.[78] (emphasis added.)

The reference to a "particular" guarantee supports the inference that "partial" incorporation has not been surplanted.

Assuming however, that incorporation did lead to total absorption of the Bill of Rights, is the threat to state sovereignty as real as the dissent would suggest? In *Duncan* the fear of encroachment upon state sovereignty stemmed specifically from the danger that not only would the particular amendment be enforced upon the state, but so also would the entire body of procedural law surrounding that prohibition.[79] The implication is that if a particular amendment is considered a fundamental constitutional right, one which cannot be encroached upon by the state, an extension of that

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facts of two different cases, one defendant should be benefitted by an extention of an analogous guarantee while the other defendant would be denied.

71 391 U.S. 145 (1968).

72 *Id.* at 174-76.

73 395 U.S. at 808.

74 *See* cases collected *supra* note 65.

75 U.S. CONST. amend. V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of Grand Jury. . . ."

76 Hurtado v. California, 110 U.S. 516 (1884).

77 C. PRITCHETT, THE AMERICAN CONSTITUTION 633 (2d ed. 1968).

78 395 U.S. at 795.

79 391 U.S. at 158 n.30.

decision could result in further imposing upon the state the federal standards of enforcement, arguably essential ingredients of the incorporated amendment.

It is questionable, however, whether federal standards would be forced upon the states to create one uniform body of procedural law regulating the area of the incorporated amendment. Although there are various amendment provisions of the Bill of Rights that require use of federal standards in order to assure their protection, this may not be true in all cases. For example, as stated by Justice Fortas:

> Jury trial is more than a principle of justice applicable to individual cases. It is a system of administration of the business of the State. While we may believe (and I do believe) that the right of jury trial is fundamental, *it does not follow that the particulars of according that right must be uniform. We should be ready to welcome state variations which do not impair—indeed, which may advance* —the theory and purpose of trial by jury.[80] (emphasis added.)

It is apparent that there will be some adoption of federal standards, but only in those areas where the standard itself is the right to be protected.[81] Incorporation thus does not by itself necessitate a wholesale adoption, without rhyme or reason, of evolutionary federal procedural development. The Court's decree is that existing federal laws, extended under the Due Process Clause, function as a "governor" rather than a "straight-jacket".

Further, as the Court does not read the Fourteenth Amendment as a mere restatement of the Bill of Rights, it does not necessarily follow that by adopting the doctrine of incorporation the Court has stated that *no* privileges exist which may be violated other than those specifically provided for in the first ten amendments. Nothing in the Court's language so restricts the operation of the Due Process Clause. Rather, in acknowledging the Fourteenth Amendment as intending to protect "fundamental" rights long recognized under the common law system,[82] the doctrine of incorporation merely recognizes the Bill of Rights as part, but not the entire scope of due process. The amendments are a definitive part of the due process concept to which the Court can refer for stability and predicta-

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[80] Bloom v. Illinois, 391 U.S. 194, 214-15 (1968). Justice Fortas' concurring opinion in *Bloom* applies also to Duncan v. Louisiana, 391 U.S. 145 (1968), previously decided.

[81] For those amendment provisions declared to be enforced against the states under the Fourteenth Amendment according to federal standards, *see* Pointer v. Texas, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation of witnesses); Malloy v. Hogan, 378 U.S. 1 (1964) (Sixth Amendment privilege against self-incrimination); Ker v. California, 374 U.S. 23 (1963) (Fourth Amendment protection against unreasonable searches and seizures); Gideon v. Wainwright, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); Cantwell v. Connecticut, 310 U.S. 296 (1940) (First Amendment freedom of religion); Gitlow v. New York, 268 U.S. 652 (1925) (First Amendment freedom of speech and press).

[82] 395 U.S. at 794-95.

bility.[83] This does not preclude the *Palko* rationale from existing as an *addition*, rather than a *competing alternative*, to incorporation. The incorporation theory, much less the specific incorporation of the Fifth Amendment privilege here, does not necessarily preclude the operation of the Due Process Clause in the traditional sense, expressd in *Palko*, as a check against state procedural violations of a fair trial. In this sense, individuals threatened by state action are availed of a double measure of protection —the *Palko* due process protection and the specific guarantees of incorporation.[84]

Justice Harlan's concern is with retaining the Due Process Clause as an independent guide to equitable principles.[85] By this interpretation, the Due Process Clause constantly requires the Court "to re-examine fundamental principles and at the same time enjoins it from reading its own preferences into the Constitution."[86] There is no reason why the Due Process Clause should not continue to function as a means of re-examining general principles of justice, while also providing for specific application of amendments to the states. The aims of incorporation, and Justice Harlan's case-by-case "fundamental fairness" standard, do not appear inconsistent. Both concepts recognize that the Constitution as framed did not anticipate the problems of today's society. Constant reinterpretation is therefore required to best provide those general protections which the amendments were originally drafted to ensure.

Seen in this light, incorporation is not per se destructive of federalism. The present Court has taken great pains to ensure this result. Federalism, although altered, still remains a vital force. The essence here is that, consistent with demands of the Fourteenth Amendment, federalism may not

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[83] A major objection to the practice of relying upon the Due Process Clause as authority for extending constitutional guarantees is that the concept is too vague. "This court has never attempted to define with precision the words 'due process of law'. . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." Holden v. Hardy, 169 U.S. 366, 389 (1898).

The question has been phrased whether there are "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," Powell v. Alabama, 287 U.S. 45, 67 (1932); whether they are "basic in our system of jurisprudence", *In re* Oliver, 333 U.S. 257, 273 (1948); and whether they are "fundamental right[s], essential to a fair trial", Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963).

[84] Another avenue may also exist. The incorporation theory may coincide with the Penumbra theory expressed by Justice Douglas in Griswold v. Connecticut, 381 U.S. 479 (1965). Under that view, protection against state action is guaranteed a defendant even though no specific Bill of Rights amendment is expressly on point. When the effect of the amendments is to cast a penumbra or shadow broader than the sum of specific narrowly drawn guarantees, indeed there may be little difference between this position and the incorporation theory.

[85] *See* Justice Harlan's dissent in Malloy v. Hogan, 378 U.S. 1, 14 (1964).

[86] *Id.* at 28-29.

substantially prejudice a defendant merely because of the fortuity of differing federal and state jurisdiction.

June E. Console